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7 IN THE UNITED STATES DISTRICT COURT
8 FOR THE DISTRICT OF ARIZONA
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10 GOLDEN SCORPIO CORP., an Arizona) No. CV-08-1781-PHX-GMS
corporation,)
11 Plaintiff,) **ORDER**
12 vs.)
13 STEEL HORSE SALOON I, et al.,)
14 Defendants.)
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17 Pending before the Court is the Motion for Default Judgment of Plaintiff Golden
18 Scorpio Corp. (Dkt. # 49.) In the motion, Plaintiff requests an entry of judgment against
19 defendants Steel Horse Saloon IV, Steel-Horse.com, Steel Horse Grill and Saloon, and The
20 Steel Horse Saloon II (“defaulted defendants”). (*See id.*) For the reasons set forth below,
21 the Court denies Plaintiff’s motion and dismisses defendants Steel Horse Saloon IV, Steel-
22 Horse.com, Steel Horse Grill and Saloon, and The Steel Horse Saloon II from the action.

23 **BACKGROUND**

24 Plaintiff Golden Scorpio is an Arizona corporation that operates a restaurant and bar
25 under the name STEEL HORSE. Since 1997, Plaintiff has used STEEL HORSE as a
26 common law trademark in relation to its restaurant and bar services. On October 19, 2004,
27 the United States Patent and Trademark Office registered the “STEEL HORSE with
28 motorcycle design” service mark to Plaintiff for restaurant services.

1 Defendant Steel Horse Saloon IV is a California business that operates a restaurant/bar
 2 under the name STEEL HORSE SALOON in Victorville, California. Plaintiff alleges that
 3 Defendant Steel Horse Saloon IV “has its business advertised on the internet at
 4 <http://www.manta.com>, under the name Steel Horse Saloon,” and that this advertising is
 5 available to Internet users in Arizona. (Dkt. # 1 ¶ 13 and Ex. 5.) The “advertisement”
 6 appearing on the <http://www.manta.com> website contains only the local address, local
 7 telephone number, and some basic information about Defendant Steel Horse Saloon IV.¹
 8 (See *id.* Ex. 5.) In the Motion for Default Judgment, Plaintiff also presents evidence that
 9 Defendant Steel Horse Saloon IV advertises its business on the Internet at
 10 http://www.quickthrottle.com/Editions/CA/weekly_events.html, and in the nationally
 11 distributed Quick Throttle magazine. (Dkt. # 49 Pt. 4 at 3, Pt. 5 Ex. A.) In the magazine and
 12 on Quick Throttle’s website, Defendant Steel Horse Saloon IV advertises its weekly “Bike
 13 Night” and provides its local address and telephone number. (*Id.*) As is evident from the
 14 URL and attached exhibit (*Id.* Ex. A), the advertisement appearing on the
 15 <http://www.quickthrottle.com> website appears under a link to the California section of the
 16 website. Outside of this Internet advertising, Plaintiff alleges no other contacts between
 17 Defendant Steel Horse Saloon IV and the State of Arizona.

18 Defendant Steel-Horse.com is an Indiana business that operates the website
 19 <http://www.steel-horse.com> to advertise motorcycle events, including events at restaurants.
 20 Plaintiff alleges that Defendant Steel-Horse.com “has its business advertised on the internet
 21 at <http://www.steel-horse.com> running food and motorcycle events under the name Steel
 22 Horse,” and that this advertising is available to Internet users in Arizona. (Dkt. # 1 ¶ 15 and
 23 Ex. 7.) The <http://www.steel-horse.com> website provides information regarding events
 24

25
 26 ¹It is unclear whether Defendant Steel Horse Saloon IV is even responsible for the
 27 information provided on the <http://www.manta.com> website. Included above Defendant
 28 Steel Horse Saloon IV’s address and phone number is the following language: “Is This Your
 Company?” (Dkt. # 1 Ex. 5.) The Court, however, need not resolve this question and will
 presume that Defendant Steel Horse Saloon IV is responsible for the information.

1 sponsored by Steel-Horse.com as well as the local telephone numbers and email addresses
2 for various individuals associated with the business. Outside of this Internet advertising,
3 Plaintiff alleges no other contacts between Defendant Steel-Horse.com and the State of
4 Arizona.

5 Defendant Steel Horse Grill and Saloon is a Maryland business that operates a
6 restaurant/bar under the name STEEL HORSE GRILL AND SALOON with its place of
7 business in Taneytown, Maryland. Plaintiff alleges that Defendant Steel Horse Grill and
8 Saloon “has its business advertised on the internet at <http://print.metroguide.com> . . . under
9 the name Steel Horse,” and that this advertising is available to Internet users in Arizona.
10 (Dkt. # 1 ¶ 16 and Ex. 8.) The “advertisement” on the <http://print.metroguide.com> website
11 provides only the local address and telephone number of Defendant Steel Horse Grill and
12 Saloon.² In addition to this allegation, Plaintiff presents evidence that Defendant Steel Horse
13 Grill and Saloon also advertises its business on the Internet at
14 <http://www.damnbikers.com/bars>. The <http://www.damnbikers.com/bars> website provides
15 the local address and phone number for Defendant Steel Horse Grill and Saloon, a map
16 showing the location of the establishment, and some customer reviews. Outside of this
17 Internet advertising, Plaintiff alleges no other contacts between Defendant Steel Horse Grill
18 and Saloon and the State of Arizona.

19 Defendant The Steel Horse Saloon II is a Rhode Island business that operates a
20 restaurant/bar under the name THE STEEL HORSE SALOON with its place of business in
21 Portsmouth, Rhode Island. Plaintiff alleges that Defendant The Steel Horse Saloon II “has
22 its business advertised on the internet at <http://www.stretchharpo.com/steelhorsesaloon.htm>
23 under the name The Steel Horse Saloon,” and that this advertising is available to Internet
24

25 ²It is unclear whether Defendant Steel Horse Grill and Saloon is even responsible for
26 the information provided on the <http://print.metroguide.com> website. Included on the
27 website, below the address and phone number, is the following language: “This restaurant
28 Profile Page is brought to you courtesy of the DiningGuide.com service.” (Dkt. # 1 Ex. 8.)
The Court, however, need not resolve this question and will presume that Defendant Steel
Horse Grill and Saloon is responsible for the information.

1 users in Arizona. (Dkt. # 1 ¶ 19 and Ex. 12.) The advertisement on the
 2 <http://www.stretchharpo.com/steelhorsesaloon.htm> website provides the local address and
 3 telephone number, local driving directions, and a local map. Outside of this Internet
 4 advertising, Plaintiff alleges no other contacts between Defendant The Steel Horse Saloon
 5 II and the State of Arizona.

6 In July of 2008, Plaintiff sent cease and desist letters to the defaulted defendants
 7 advising them of Plaintiff's trademark rights and urging them to halt "all usage of the terms
 8 or any other colorable imitation of any of [Golden Scorpio's] STEEL HORSE mark." (Dkt.
 9 # 62 Pt. 2 Ex. 1.) After failing to respond to the cease and desist letters, Plaintiff sued the
 10 defaulted defendants along with nine other business entities spread across the United States,
 11 alleging federal and common law trademark infringement, unfair competition, and trademark
 12 dilution. (*See* Dkt. # 1.) Plaintiff alleges that it is the defaulted defendants' advertising alone
 13 that gives rise to minimum contacts between the defaulted defendants and the state of
 14 Arizona sufficient for this Court to exercise personal jurisdiction. On December 19, 2008,
 15 default was entered by the Clerk of the Court against these four defendants due to their
 16 failure to plead or otherwise defend. (Dkt. # 40.) On December 31, 2008, Plaintiff filed their
 17 Motion for Default Judgment seeking monetary and injunctive relief against the defaulted
 18 defendants. (Dkt. # 49.)

19 DISCUSSION

20 I. Jurisdictional Standard for Default Judgment

21 When considering whether to enter a default judgment, a court has "an affirmative
 22 duty to look into its jurisdiction over both the subject matter and the parties." *In re Tuli*, 172
 23 F.3d 707, 712 (9th Cir. 1999) ("To avoid entering a default judgment that can later be
 24 successfully attacked as void, a court should determine whether it has the power, i.e., the
 25 jurisdiction, to enter judgment in the first place."); *see also Williams v. Life Sav. & Loan*, 802
 26 F.2d 1200, 1203 (10th Cir. 1986) ("In reviewing its personal jurisdiction . . . the court
 27 exercises its responsibility to determine that it has the power to enter the default judgment.")
 28 "[W]hen a court is considering whether to enter a default judgment, it may dismiss an action

1 *sua sponte* for lack of personal jurisdiction.” *In re Tuli*, 172 F.3d at 712. Where there are
 2 questions about the existence of personal jurisdiction, however, a court should allow the
 3 plaintiff the opportunity to establish that jurisdiction is proper. *Id.* at 713. Accordingly, on
 4 January 27, 2009, the Court directed Plaintiff to “file a memorandum and the factual record
 5 supporting personal jurisdiction” over the defaulted defendants. (Dkt. # 57 at 2.) Plaintiff
 6 filed a response on January 30, 2009. (Dkt. # 62.)

7 **II. Personal Jurisdiction**

8 **A. Plaintiff Bears the Burden of Proof**

9 “The party seeking to invoke the court’s jurisdiction bears the burden of establishing
 10 that jurisdiction exists.” *Scott v. Breeland*, 792 F.2d 925, 927 (9th Cir. 1986) (citing *Data*
 11 *Disc, Inc. v. Sys. Tech. Assocs.*, 557 F.2d 1280, 1285 (9th Cir. 1977)). Because the Court is
 12 resolving the motion to dismiss without holding an evidentiary hearing, Plaintiff “need make
 13 only a *prima facie* showing of jurisdictional facts to withstand [dismissal].” *Ballard v.*
 14 *Savage*, 65 F.3d 1495, 1498 (9th Cir. 1995); *see also Brainerd v. Governors of the Univ. of*
 15 *Alberta*, 873 F.2d 1257, 1258 (9th Cir. 1989). That is, Plaintiff “need only demonstrate facts
 16 that if true would support jurisdiction over [Defendant].” *Ballard*, 65 F.3d at 1498.

17 **B. Substantive Personal Jurisdiction Standard**

18 “Personal jurisdiction over an out-of-state defendant is appropriate if the relevant
 19 state’s long arm-statute permits the assertion of jurisdiction without violating federal due
 20 process.” *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800-01 (9th Cir. 2004).
 21 Because Arizona’s long arm statute is co-extensive with federal due process requirements,
 22 the jurisdictional analyses under Arizona law and federal due process are the same. *See id.*
 23 at 801; *Terracom v. Valley Nat’l Bank*, 49 F.3d 555, 559 (9th Cir. 1995); Ariz. R. Civ. P.
 24 4.2(a). Therefore, absent traditional bases for personal jurisdiction (*i.e.*, physical presence,
 25 domicile, and consent), the Due Process Clause requires that nonresident defendants have
 26 certain “minimum contacts” with the forum state such that the exercise of personal
 27 jurisdiction does not offend traditional notions of fair play and substantial justice. *See Int’l*
 28 *Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

1 “In determining whether a defendant had minimum contacts with the forum state such
 2 that the exercise of jurisdiction over the defendant would not offend the Due Process Clause,
 3 courts focus on ‘the relationship among the defendant, the forum, and the litigation.’”
 4 *Brink v. First Credit Res.*, 57 F. Supp. 2d 848, 860 (D. Ariz. 1999) (citing *Shaffer v. Heitner*,
 5 433 U.S. 186, 204 (1977)). If a court determines that a defendant’s contacts with the forum
 6 state are sufficient to satisfy the Due Process Clause, then the court must exercise either
 7 “general” or “specific” jurisdiction over the defendant. *See Ziegler v. Indian River County*,
 8 64 F.3d 470, 473 (9th Cir. 1995); *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S.
 9 408, 414-15 nn.8-9 (1984). General jurisdiction refers to the authority of a court to exercise
 10 jurisdiction even where the cause of action is unrelated to the defendant’s contacts with the
 11 forum. *Helicopteros*, 466 U.S. at 408. Specific jurisdiction refers to the authority of a court
 12 to exercise jurisdiction when a suit arises out of or is related to the defendant’s contacts with
 13 the forum. *Id.* The nature of the defendant’s contacts with the forum state, therefore, will
 14 determine whether the court exercises general or specific jurisdiction over the defendant. *Id.*

15 **1. General Jurisdiction**

16 A court may assert general jurisdiction over a defendant if the defendant engages in
 17 “substantial” or “continuous and systematic” business activities, *Helicopteros*, 466 U.S. at
 18 416 (citing *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 446-47 (1952)), that
 19 “approximate physical presence” in the forum state. *Bancroft & Masters, Inc. v. Augusta*
 20 *Nat. Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000) (explaining that the following factors are to
 21 be considered in determining whether general jurisdiction may be exercised: “whether
 22 defendant makes sales, solicits or engages in business in the state, serves the state’s markets,
 23 designates an agent for service of process, holds a license, or is incorporated there”); *see also*
 24 *Brand v. Menlove Dodge*, 796 F.2d 1070, 1073 (9th Cir. 1986) (collecting cases where
 25 general jurisdiction was denied despite the defendants’ significant contacts with the forum
 26 states)). Here, Plaintiff argues in support of general jurisdiction over the defaulted
 27 defendants, stating that the facts show “continuous and systematic contacts with the forum
 28 state.” (Dkt. # 62 Pt. 2 at 8.)

1 The only jurisdictional facts Plaintiff alleges or for which it provides evidence are: (1)
2 the defaulted defendants each advertised on the Internet and their advertising was available
3 to Internet users in Arizona; and (2) Defendant Steel Horse Saloon IV advertised in a
4 national magazine that was available in Arizona. (*See* Dkt. ## 1, 49, 62, 66.) It is
5 uncontested, however, that the defaulted defendants' places of business are in states other
6 than Arizona, and Plaintiff does not allege that any of the defaulted defendants have ever
7 engaged in business transactions or made sales in Arizona. Plaintiff does not allege or argue
8 that any of the defaulted defendants own property in Arizona, owe taxes in Arizona, or
9 maintain offices, employees, telephone numbers, Post Office boxes or bank accounts in
10 Arizona. Nor does Plaintiff allege or argue that any of the defaulted defendants are
11 registered or licensed to conduct business in Arizona, or that any have designated an agent
12 for service of process in Arizona. The Court, therefore, cannot exercise general jurisdiction
13 over the defaulted defendants because their contacts neither qualify as "substantial" nor
14 "continuous and systematic" so as to approximate their physical presence in Arizona.
15 Therefore, while the defaulted defendants may have facilitated advertising which was
16 available in Arizona, they were not doing business in Arizona, and so while they may have
17 "stepped through the door, there is no indication that [they have] sat down and made
18 [themselves] at home." *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284
19 F.3d 1114, 1125 (9th Cir. 2002); *see also Gator.Com Corp. v. L.L. Bean*, 341 F.3d 1072,
20 1079 (9th Cir. 1997) ("This test requires both that the party in question clearly do business
21 over the Internet, and that the Internet business contacts with the forum state be substantial
22 or continuous and systematic.") (citations and quotation omitted); *GTE New Media Servs.,*
23 *Inc. v. BellSouth Corp.*, 199 F.3d 1343, 1349-50 (D.C. Cir. 2000) (stating that mere operation
24 of an interactive website "does not by itself show any persistent course of conduct by
25 defendants in the [forum state]").

26 Therefore, Plaintiff has not made a *prima facie* showing of jurisdictional facts
27 sufficient for the Court to exercise general jurisdiction against any of the defaulted
28 defendants.

2. Specific Jurisdiction

In the Ninth Circuit, specific jurisdiction may be exercised only if: (1) the defendant *purposefully avails* himself of the privileges of conducting activities in the forum, thereby invoking the benefits and protections of its laws, or purposely directs conduct at the forum that has *effects* in the forum; (2) the claim *arises out of* the defendant's forum-related activities; and (3) the exercise of jurisdiction comports with fair play and substantial justice; i.e., it is *reasonable*. See *Bancroft*, 223 F.3d at 1086-87 (citing *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 417 (9th Cir. 1997)); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472-76 (1985).

In discussing specific jurisdiction, the United States Supreme Court emphasized long ago that "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."³ *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). More recently, however, the Supreme Court held that a court may also have specific jurisdiction over a defendant where the intended effects of the defendant's non-forum conduct were purposely directed at and caused harm in the forum state. *Calder v. Jones*, 465 U.S. 783, 788-90 (1984); see also *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1155-56 (9th Cir. 2006) (noting that purposeful direction analysis is appropriate when "all of [the defendant's] action identified by [the plaintiff] is taking place outside the forum"); *Sinatra v. Nat'l Enquirer*, 854 F.2d 1191, 1195 (9th Cir. 1988) ("[T]he decisions of this court have interpreted the holdings of *Calder* and *Burger King* as modifying the purposeful availment rubric to allow 'the exercise of jurisdiction over a defendant whose only contact with the forum is the purposeful direction of a *foreign* act having an *effect* in the forum state.'")

³Plaintiff fails to identify conduct by any of the defaulted defendants that occurred in Arizona that would support the purposeful availment concept. See *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1155-56 (9th Cir. 2006) ("Evidence of availment is typically action taking place in the forum that invokes the benefits and protections of the laws in the forum.").

(quoting *Haisten v. Grass Valley Med. Reimbursement Fund*, 784 F.2d 1392, 1397 (9th Cir. 1986)) (emphasis in original). *But see Cybersell*, 130 F.3d at 420 (holding that the “effects” test did not “apply with the same force” in a trademark infringement and unfair competition action against a business entity in which the defendant’s contact with Arizona arose only from infringing use of the plaintiff’s trademarks on the Internet but nonetheless holding that “[defendant’s] web page simply was not aimed intentionally at Arizona knowing that harm was likely to be caused there to [plaintiff]”).

In analyzing the “effects” test, a court applies the *Calder* test, in which the defendant must have: “(1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state.” *Dole Food Co., Inc. v. Watts*, 303 F.3d 1104, 1111 (9th Cir. 2002). Consistent with the effects test, Plaintiff argues that “[i]t is clear, each of [the defaulted] defendants, by continuing to advertise with websites or magazines available in Arizona[,] after Plaintiff’s [cease and desist] letters[,] purposefully directed their activities toward the State of Arizona.” (Dkt. # 62 Pt. 2 at 6.) Keeping in mind that “[a] finding of ‘express aiming’ . . . does not mean ‘that a foreign act with foreseeable effects in the forum state[] always gives rise to specific jurisdiction,’” *Dole*, 303 F.3d at 1112 (quoting *Bancroft*, 223 F.3d at 1087); *see also Cybersell*, 130 F.3d at 418 (“Creating a site, like placing a product in the stream of commerce, may be felt nationwide – or even worldwide – but, without more, it is not an act purposefully directed toward the forum state.”) (quotation omitted), and keeping in mind that the purposeful availment requirement means that jurisdictional contacts must be significant and substantial rather than “random, fortuitous or attenuated,” *Burger King*, 417 U.S. at 475, the defaulted defendants’ conduct will be weighed to determine whether the exercise of specific jurisdiction is proper.

The record before the Court clearly sets forth facts sufficient to establish an intentional act on the part of the defaulted defendants. Plaintiff alleges and provides supporting evidence that the defaulted defendants actively procured advertising on the Internet for their respective businesses. Additionally, Plaintiff provides evidence that

1 Defendant Steel Horse Saloon IV procured advertising in Quick Throttle Magazine. These
2 acts, performed outside of Arizona, are sufficient to satisfy the intentional act requirement.

3 The next question is whether the defaulted defendants' intentional acts, *i.e.*, the
4 infringing advertisements, were expressly aimed or deliberately directed at Arizona. This
5 issue was clarified by the Ninth Circuit in *Schwarzenegger*. In that case, Arnold
6 Schwarzenegger filed suit in California against an Ohio car dealership for the unauthorized
7 use of his photograph in its advertisements. The Ninth Circuit concluded that the federal
8 court in California did not have specific jurisdiction over the Ohio dealership because, under
9 the effects test, it could not be said that the dealership had purposefully directed its actions
10 at California since the dealership's advertisements were targeted solely at Ohio consumers:

11 Schwarzenegger does not point to any conduct by Fred Martin
12 in California related to the Advertisement that would be readily
13 susceptible to a purposeful availment analysis. Rather, the
14 conduct of which Schwarzenegger complains – the unauthorized
15 inclusion of the photograph in the Advertisement and its
16 distribution in the Akron Beacon Journal – took place in Ohio,
17 not California. Fred Martin received no benefit, privilege, or
protection from California in connection with the
Advertisement, and the traditional *quid pro quo* justification for
finding purposeful availment thus does not apply. Therefore, to
the extent that Fred Martin's conduct might justify the exercise
of personal jurisdiction in California, that conduct must have
been purposefully directed at California.

18 *Schwarzenegger*, 374 F.3d at 803. The Ninth Circuit has made it clear that any intentional
19 conduct “must be targeted at a plaintiff whom the defendant knows to be a resident of the
20 forum state.” *Bancroft*, 223 F.3d at 1087; *see also Goldberg v. Cameron*, 482 F. Supp. 2d
21 1136, 1146 (N.D. Cal. 2007) (holding that defendants who willfully infringed a plaintiff's
22 copyright and who acted with the intent to produce movies for worldwide distribution,
23 including in the forum state, sufficiently satisfied the purposeful direction requirement);
24 *Panavision Intern., L.P. v. Toeppen*, 141 F.3d 1316, 1322 (9th Cir. 1998) (holding that a
25 defendant who “engaged in a scheme to register Panavision's trademarks as his domain
26 names for the purpose of extorting money from Panavision” was enough to “demonstrat[e]
27 that the defendant directed his activity toward the forum state). Accordingly, the Court must
28 determine whether the defaulted defendants facilitation or posting of advertisements on the

Internet or in a national magazine was conduct that was expressly aimed by the defaulted defendants at Arizona.

a. Internet Advertising

Use of the Internet creates difficult problems of personal jurisdiction because the Internet is not specifically targeted at people in any particular state. *See CIVIX-DDI LLC v. Microsoft Corp.*, 52 U.S.P.Q.2d 1501, 1503-06 (D. Colo. 1999) (“The Internet may represent the latest and greatest challenge to questions of personal jurisdiction.”). In *Cybersell*, the Ninth Circuit was confronted with the issue of whether an allegedly infringing use of a service mark on a website on the Internet was a sufficient basis for the exercise of personal jurisdiction in the state where the holder of the mark had its principal place of business. 130 F.3d at 415-20. The court reasoned that “the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of the commercial activity that the entity conducts over the internet,” *id.* at 419, and held that “the essentially passive nature of [the defendant’s] activity in posting a home page on the World Wide Web that allegedly used the service mark of [the plaintiff] does not qualify as purposeful activity invoking the benefits and protections of [the forum state],” *id.* at 418-19. In making its ruling, the court specifically noted that the defendant did nothing to encourage Arizona residents to visit the website, did not conduct business in Arizona, entered no contracts with Arizona residents, earned no income from Arizona, received no telephone calls from Arizona, and did not maintain an 800 telephone number. *Id.* at 419. The court indicated that there must be “something more” to “indicate that the defendant purposefully (albeit electronically) directed his activity in a substantial way to the forum state.” *Id.* at 418.

In a more recent case, the Ninth Circuit applied the “effects” test in affirming a district court’s dismissal of a case for lack of personal jurisdiction. *See Pebble Beach*, 453 F.3d at 1156. In *Pebble Beach*, the defendant operated a bed and breakfast in southern England called “Pebble Beach” and advertised the inn on the website www.pebblebeach-uk.com. *Id.* at 1153. The plaintiff, a golf course and resort located in California, had used “Pebble Beach” as its trademark for 50 years. Pebble Beach sued the operator of the bed and

1 breakfast for intentional infringement and dilution of its PEBBLE BEACH mark. Because
2 all of the defendant's actions occurred outside of California, the court applied the "effects"
3 test and further defined the "something more" required under *Cybersell* as action directed at
4 the forum state such as individualized targeting of a forum resident. *Id.* at 1155-56. After
5 concluding that the defendant's "only substantial action is a domain name and non-
6 interactive web site," the court affirmed its position in *Cybersell* that a passive website alone
7 does not constitute express aiming. *Id.* at 1157-58. The court stated that "the fact that [the
8 defendant's] website is not directed at California is controlling." *Id.* at 1158 ("[T]here can
9 be no doubt that we still require "something more" than just a foreseeable effect to conclude
10 that personal jurisdiction is proper . . . [and] an internet domain name and passive website
11 alone are not "something more . . ."). Therefore, the determinative question here is whether
12 the defaulted defendants' advertising conduct satisfies the "something more" that is required
13 – whether any of their advertising conduct was expressly aimed at Arizona.

14 In this case, Plaintiff's evidence and allegations are insufficient to show that the
15 defaulted defendants purposefully directed their advertisements at Arizona. Like *Pebble*
16 *Beach* and *Schwarzenegger*, where the plaintiffs "relie[d] almost exclusively on the possible
17 foreseeable effects . . . of a non-interactive advertisement," Plaintiff similarly relies on
18 advertising that, although having foreseeable effects in Arizona, was not shown to be
19 deliberately aimed at Arizona by the defaulted defendants. Each of the websites alleged to
20 have been used by the defaulted defendants for advertising are passive in nature. Indeed, the
21 Steel Horse advertisements appearing on the <http://www.manta.com>,
22 http://www.quickthrottle.com/Editions/CA/weekly_events.html, <http://print.metroguide.com>,
23 <http://www.damn bikers.com/bars>, and <http://www.stretchharpo.com/steelhorsesaloon.htm>
24 websites generally only contain the local address and telephone numbers for the relevant
25 defendant. Plaintiff has not alleged or provided evidence that any of these third-party
26 websites are directed at Arizona residents or, if so, that any of the defaulted defendants were
27 aware of the specific audience. Additionally, the <http://www.steel-horse.com> website
28 appears also to be essentially passive in nature and to only provide information regarding

1 events sponsored by Steel-Horse.com as well as the local telephone numbers and email
2 addresses for various individuals associated with the business. Plaintiff fails to allege or
3 present evidence suggesting that the defaulted defendants (1) did anything to encourage
4 Arizona residents to visit the websites on which the allegedly infringing advertisements
5 appeared, (2) engaged in any business in Arizona, (3) entered into any contracts with Arizona
6 residents, (4) earned any income from Arizona, (5) received any telephone calls from
7 Arizona, (6) or maintained a toll-free telephone number. Indeed, outside of Plaintiff's hits
8 on these websites, there is no evidence or allegation that any Arizona resident has ever
9 viewed the advertisements appearing on these websites.

10 Additionally, just because the defaulted defendants each had received a cease and
11 desist letter and were therefore aware of the existence of Plaintiff in Arizona, does not
12 transform their acts into acts expressly aimed at Arizona. *See Pebble Beach*, 453 F.3d at
13 1158 (holding that the defendant's knowledge of the California Pebble Beach golf resort
14 "goes to the foreseeable effect prong of the 'effects test' and is not an independent act that
15 can be interpreted as being expressly aimed at California."); *Cybersell*, 130 F.3d at 416
16 (finding a lack of personal jurisdiction even though the plaintiff had corresponded with the
17 defendant alerting the defendant to the plaintiff's trademark rights and location). Also, the
18 mere fact that some minor amount of competition may exist between Plaintiff and the
19 defaulted defendants is insufficient to support the proposition that the defaulted defendants
20 conduct was expressly aimed at Arizona.⁴

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23 ⁴ *But cf. The Bear Mill, Inc. v. Teddy Mountain, Inc.*, No. 07-492, 2008 WL 2323483,
24 at *6 (D. Idaho May 7, 2008) (finding that "[t]he fact that the parties are competitors in the
25 teddy bear and franchise business, coupled with Defendant's knowledge of the location of
26 Plaintiffs' business" satisfies the "effects" test); *Precision Craft Log Structures, Inc. v. Cabin*
27 *Kit Co.*, No. 05-199, 2006 WL 538819, at *7 (D. Idaho Mar. 3, 2006) (finding that because
28 the parties were competitors and both parties sold throughout the United States, the
defendant's "alleged intentional actions were expressly aimed or directed at the forum state
and caused harm which the defendant knew would be suffered in the forum state where
Precision Craft had its principal place of business").

1 While the defaulted defendants' conduct in facilitating or posting advertisements on
 2 the Internet were likely "foreign act[s] with foreseeable effects in the [Arizona]," *Dole*, 303
 3 F.3d at 1112, the jurisdictional contacts are too attenuated and lack the "something more"
 4 required to exercise personal jurisdiction consistent with federal due process. Therefore,
 5 because the jurisdictional contacts for defendants Steel-Horse.com, Steel Horse Grill and
 6 Saloon, and The Steel Horse II derive solely from passive Internet advertising, personal
 7 jurisdiction cannot be exercised in Arizona.

8 **b. Magazine Advertising**

9 Defendant Steel Horse Saloon IV, however, in addition to passive Internet advertising,
 10 also advertised its business in a national magazine that was available to Arizona residents and
 11 delivered to at least one Arizona business – Plaintiff's. (*See* Dkt. # 49 Pt. 4 at 3 ("[S]ince at
 12 least November 2007, a listing has been advertised in Quick Throttle magazine, distributed
 13 nationally").) Plaintiff, however, presents no evidence suggesting that the editions of
 14 Quick Throttle Magazine containing Defendant Steel Horse Saloon IV's advertisement were
 15 meaningfully distributed in Arizona. Plaintiff also provides no evidence suggesting that
 16 Defendant Steel Horse Saloon IV even acquired any business in its California establishment
 17 from Arizona residents as a result of its magazine advertising. Nevertheless, Plaintiff argues
 18 that "[Steel Horse Saloon IV] purposefully directed its infringing advertisements in . . . Quick
 19 Throttle magazine, directly to Plaintiff's own Steel Horse Saloon [in] Phoenix, AZ." (Dkt.
 20 # 66 at 2.)

21 Nevertheless, Plaintiff's characterization of the inquiry is correct – whether Defendant
 22 Steel Horse Saloon IV expressly aimed its advertisements at Arizona residents, including
 23 Plaintiff. *See Federated Rural Elec. Ins. Corp. v. Kootenai Elec. Coop.*, 17 F.3d 1302, 1305
 24 (10th Cir. 1994) ("We have previously held that evidence of mere placement of
 25 advertisements in nationally distributed papers or journals does not rise to the level of
 26 purposeful contact with a forum required by the Constitution in order to exercise personal
 27 jurisdiction over the advertiser."); *Wines v. Lake Havasu Boat Mfg., Inc.*, 846 F.2d 40, 43
 28 (8th Cir. 1988) (holding that an Arizona boat maker who advertised in national publications

1 was not subject to specific jurisdiction in Minnesota because the advertising was not aimed
2 at Minnesota); *Land-O-Nod Co. v. Bassett Furniture Indus., Inc.*, 708 F.2d 1338, 1341 (8th
3 Cir. 1983) (holding that national advertising appearing in a trade journal was insufficient to
4 support specific jurisdiction); *Hamilton v. Accu-Tek*, 32 F. Supp. 2d 47, 70 & n.30 (E.D.N.Y.
5 1998) (explaining that “advertisements placed in national publications such as trade
6 magazines have been held insufficient to support” either specific or general jurisdiction);
7 *Alsop v. Carolina Custom Products, Inc.*, No. EDCV 07-212-VAP, 2007 WL 2441025, at
8 *7 (C.D. Cal. June 29, 2007) (“Defendant has not targeted advertising or promotional
9 materials to residents of California because it advertises in motorcycle magazines that are
10 nationally distributed. Less than one percent of the sales were to California residents during
11 the fifteen month period . . . and none of these sales included the allegedly infringing
12 products.”). Like the Internet advertising discussed above, however, there is no indication
13 that the Quick Throttle magazine advertising was purposefully aimed at residents of Arizona,
14 any more than residents of any other state, including California – the home of Defendant
15 Steel Horse Saloon IV and the likely target of its advertising. Plaintiff fails to allege or
16 present evidence suggesting that Defendant Steel Horse Saloon IV (1) did anything to
17 encourage Arizona residents to view its advertisement, (2) engaged in any business in
18 Arizona, (3) entered into any contracts with Arizona residents, (4) earned any income from
19 Arizona, (5) received any telephone calls from Arizona, or (6) maintained a toll-free
20 telephone number. Without this type of evidence, the Court is unable to conclude that
21 Defendant Steel Horse Saloon IV aimed its magazine advertising at either the residents of
22 Arizona or at Plaintiff. Therefore, because the jurisdictional contacts for Defendant Steel
23 Horse Saloon IV derive solely from passive Internet advertising and national magazine
24 advertising not aimed at Arizona, personal jurisdiction cannot be exercised here.

25 Because the Court finds that Plaintiff has failed to meet its burden of establishing
26 personal jurisdiction under the “effects” test, the Court need not reach the second and third
27 inquiries in the test for specific jurisdiction – whether Plaintiff’s claim arises out of the
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1 defaulted defendants' forum-related activities and whether the exercise of jurisdiction would
2 be reasonable.

3 **CONCLUSION**

4 Because Plaintiff has not established that the defaulted defendants purposefully
5 availed themselves of the privilege of conducting activities within Arizona or purposefully
6 directed their activities at Arizona:

7 **IT IS THEREFORE ORDERED** that Plaintiff's Motion for Default Judgment (Dkt.
8 # 49) is **DENIED**.

9 **IT IS FURTHER ORDERED** that defendants Steel Horse Saloon IV, Steel-
10 Horse.com, Steel Horse Grill and Saloon, and The Steel Horse Saloon II are **DISMISSED**
11 for lack of personal jurisdiction.

12 DATED this 11th day of February, 2009.

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15 G. Murray Snow
16 United States District Judge
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